92-1086

No._____

Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1992

BOB THOMAS,
Petitioner,

vs.

THE CITY OF HOUSTON, TEXAS
Respondent.

Petition for Writ of Certiorari
to the
United States Court of Appeals
for the Fifth Circuit

Petition for Writ of Certiorari

LAURENCE W. WATTS
Counsel of Record
WATTS, GLOVER & WELLS, L.L.P.
1909 MORGAN
HOUSTON, TX 77006
(713) 524-8222
Attorneys for the Petitioner

38 pgs

QUESTIONS PRESENTED

1. Whether a municipality may insulate itself from civil liability by a delegation of employment decision-making authority to junior officers within a police department?

2. Whether several instances of retaliation, though individually insufficient to create municipal liability, can cumulate to a point that a significant constitutional injury occurs, giving rise to municipal liability?

3. Whether a pattern or practice of retaliation for the exercise of protected speech can be established by expert and/or historical testimony as to the common practice or procedure within the department?

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THE PARTIES

Bob Thomas, Petitioner

The City of Houston, Texas, Respondent

ATTORNEYS FOR THE PARTIES

Attorneys for Defendant-Appellant:

City of Houston Legal Department, Houston, Texas

Honorable Jerry Smith,
U. S. Circuit Judge and former City Attorney

Clarence A. West,
Senior Assistant City Attorney

John E. Fisher,
Senior Assistant City Attorney

Jo Ann Bowen Russu,
Assistant City Attorney

David Crawford,
Former Assistant City Attorney, now in private practice

Mary Dinan,
Former Assistant City Attorney, now in private practice

Attorneys for Plaintiff-Appellee:

Laurence W. Watts

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Petition for Rehearing Denied
NO. 91-2601 (5th Cir.
September 1, 1992)

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to Supreme Court Rule 13.4. This Petition is timely filed within ninety days after the Petition for Rehearing was denied. The underlying basis for jurisdiction is Title 28, Section 1254 (1).

BASIS FOR THE CAUSE OF ACTION

This case involves a claim of retaliatory transfers and other retaliatory treatment by the Houston Police Department in violation of Petitioner's property and liberty interests guaranteed by the Fourteenth Amendment of the United States Constitution and enforceable under Title 42, Sections 1983 and 1988. (See appendix for text.)

SUMMARY OF THE ARGUMENT

The Circuit Courts have developed diverse and inconsistent interpretations of the doctrine established by this Court in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). Three critical concepts need to be addressed by this Court so that rights secured by the United States Constitution are uniformly enforceable and available to all citizens of this nation.

First, the Fifth Circuits own rulings are internally inconsistent. Compare Bowen v. Watkins, 669 F. 2d 979, 989-90 (5th Cir. 1982) and Thomas v. City of Houston, No. 91-261 (5th Cir. Sept. 1, 1992). In Bowen, the final authority for employment decisions rested with the Chief of Police. The Bowen Court ruled that "If Chief of Police Watkins is the

final authority in this area, and his choices represent municipal policy, the municipality is liable for any Section 1983 violation for which he is liable." Yet in Thomas, although the evidence showed that the final employment decision rested with the Chief of police, and that the Chief of Police routinely and as a matter of official Police Department policy directed lower level officers such as Lt. Webber to carry out the employment decisions actually made at a higher level, the Fifth Circuit reversed the proper ruling and decision of the District Court.

Second, the Fifth Circuit ignored the evidence which showed that the Petitioner had been repeatedly retaliated against during a two year span of his employment with the Houston Police Department. This

second issue technically subdivides itself into two questions:

(a). Can retaliation be shown by evidence which conclusively demonstrates that the Petitioner's continuing exercise of his right of free speech and political franchise was a but-for-cause of the Petitioner's disciplinary transfer and denial of seniority?

(b). Can the Petitioner establish that multiple acts by the Respondents were motivated by an intent to retaliate for the Petitioner's exercise of protected activities and create municipal liability for the overall conduct even if no individual incident might be sufficient to establish municipal liability?

Paragraph "a" (above) addresses the question of whether or not circumstantial evidence of repeated adverse employment

treatment which directly correlates to repeated public exercise of fundamental rights (freedom of speech and political advocacy) can ever be sufficient to support a jury finding of a municipal policy to retaliate against officers for the exercise of their fundamental rights. The evidence in this case showed that each time the Petitioner spoke out on a matter of general public concern, the Houston Police Department retaliated by in one way or another taking away or destroying the employment rights his years of seniority and hard work had earned.

This Court established an elevated requirement for the imposition of liability on a municipality. However, the District Courts have, at times, chosen to interpret that elevated burden

of proof into a grant of absolute immunity. Only a clarification from this Court of how municipal liability may be established will provide for a reasonably consistent interpretation.

Paragraph "b" (above) asks this Court to address for the first time the question of whether what might individually be referred to as minor transgressions of the Petitioner's rights can have a cumulative effect sufficient to meet the elevated requirements of the imposition of liability on a municipality. In this case the Petitioner suffered a cumulative loss of rights, privileges and income with each additional act of retaliation. Although the Fifth Circuit's opinion addresses only one of the retaliatory acts and holds that retaliatory act was not

committed by an official policy maker for the City of Houston, that ruling completely misses the more valid intellectual ground which had been properly presented to the Court of Appeals. Even if that one act of retaliation was not directly committed by an official policy maker for the City of Houston, it was approved and thereby ratified in advance by the Chief of Police and his direct instructions to Capt. Schumann.

Third, several officers and a well respected expert and historian on police matters in the State of Texas testified as to the custom or policy of transferring an officer in retaliation for the exercise of free speech. Clear testimony showed a history of more than forty years of retaliatory transfers

because of union activities. The Fifth Circuit by the effect of its ruling has determined that such evidence is not relevant, and a matter of law is insufficient as a basis for municipal liability.

Argument

The Petitioner, Bob Thomas (Thomas), respectfully submits that the panel in the United States Court of Appeals for the Fifth Circuit was mislead by the statement of facts submitted by the City of Houston in their principal Brief for the Appellant and thereby caused the court to overlook or misapprehend the additional true facts of municipal liability. The City of Houston (City) strategically elected to limit their two page statement of facts to the transfer of Thomas that occurred in September, 1983. The City did not mention or refer to the transfer of Thomas that occurred in June, 1981. Thomas alleged that this transfer (June, 1981) was the most egregious incident of misconduct by the City and meets all of the elements of

Monell vs. New York City Department of Social Services, 436 U.S. 658 (1978) and Bowen vs. Watkins, 669 F.2d 979 (1982).

Judge Jolly, in his opinion, limited his discussion of the facts to the transfer of September, 1983 and apparently based the judgment in favor of the city on the limited set of facts presented by the city in their principal and reply appellant brief. Therefore, the petitioner is of the opinion that the Court of Appeals has overlooked or misapprehended the total set of facts of this case.

The September, 1983 transfer was only a small excerpt of the testimony presented during the eleven days of the trial. During the trial, a total of twenty-nine (29) witnesses testified and the transcript of the trial consisted of

one thousand four hundred twenty-seven pages (1,427) of testimony compiled in nine (9) volumes.

The City vigorously objected to the testimony regarding the June 1981 transfer. In fact, the City, via their principal appellant brief, alleged that the district court abused its discretion in admitting Plaintiff's Group Exhibit #7 (tape recordings of the Houston Police Department deputy chiefs who elected to transfer Thomas in retaliation for his union activities). However, once again the City shrewdly did not reveal the true contents of the exhibits and the testimony regarding the exhibits which clearly and undisputedly proved that the transfer of Thomas in June, 1981 was a policy and or practice of the city or police department of discriminating

against employees who engage in protected speech.

Deputy Chief of Police Mitchell Gibson admitted in a taped telephone conversation that the decision to transfer Thomas was made by the command staff at a June 3, 1981 meeting. (Plaintiff's Exhibit #7). Further, the testimony at trial included Chief Gibson admitting that the transfer of Thomas was a policy or custom of the police department of discriminating against employees who engage in protected speech. Chief Gibson admitted that the transfer of Thomas was a combination of factors; Thomas' article in the union newspaper criticizing Chief of Police Johnson (Plaintiff's Exhibit #6); Thomas' union activities on behalf of patrolmen and detectives; and the grievance bill (Texas

House Bill 1115).

The petitioner respectfully addresses the justices to Plaintiff's Exhibits 1 and 2. In these exhibits (dated June 8, 1981), the chief of police responds to the plaintiff's grievance and gives final approval to the transfer. Therefore, pursuant to Bowen vs. Watkins, 669 F.2d 979, 989 (5th Circuit 1982) the municipal liability for the City attached for job action against a policeman because the decision by one exercising final authority was proved clearly and uncontrovertedly by these exhibits.

At some level of authority, there must be an official whose acts reflect governmental policy, for the government necessarily acts through its agents. Thus, the question becomes one of identifying the official who has

authority to make policy; then municipal liability attaches to acts performed pursuant to that policy. Bowen vs. Watkins, 669 F.2d 979, at 989 (1982).

The long standing policy or custom of the City of discriminating against employees by transfers was proven by the uncontested and uncontroverted testimony of two witnesses.

Lt. Garvis Gilbert, a thirty-five (35) year veteran of the Houston Police Department, and the senior ranked lieutenant with twenty-eight (28) years of in-grade tenure, testified that the command staff had a long standing practice of transferring officers for disciplinary reasons. He stated that it was a fact of life. Assistant Chief of Police Thomas Koby testified in response to a question by the city attorney that

even he had received a disciplinary transfer (1978) and that disciplinary transfers were still a fact of life at the time of trial. Further, he testified that disciplinary transfers did not violate the rules and policies and procedures of the Houston Police Department (Vol. 4, pg. 107). Chief Koby wa a twenty-one (21) year veteran of the Houston Police Department, who at the time of trial, supervised approximately 2,700 officers or 68% of the department. (Vol 4, pg. 77).

Lt. Gilbert, the immediate supervisor over Thomas, testified that the June, 1981 transfer was "unusual" and it was the only occasion that an officer under his supervision had been transferred by the command staff without his recommendation or permission (a span of

28 years) (Vol. 3, pgs. 32-35).

The evidence submitted to the jury and the trial judge clearly showed that the deprivation of the First Amendment Rights of Thomas was the result of a long standing City policy or custom; that the municipal liability of the City attached because the decision to approve the transfer was made by the Chief of Police, B. K. Johnson, who exercised the final authority for the City; and that the City of Houston Police Department had a policy or custom of discriminating against employees who engage in protected speech that dated as far back as 1950.

Sgt. Bill Elkin, a thirty-six and one-half year veteran of the Houston Police Department, testified in response to a question proposed by the City of Houston attorney, that his father had been the

victim of deprivation of rights because of union activities in the early 1950's (Vol. 3, pgs. 55-56).

Mr. Ron Delord, the expert witness for the plaintiff, testified that transfers were the most common use of discipline by cities or police departments in Texas to deprive an officer of his first amendment rights when the officer was critical of a decision by a command staff and spoke out on matters of public concern. Further, his testimony established the policy or custom of the city or police department of discriminating against employees who engage in protected speech. Once again, the City did not offer any evidence to refute or contradict the testimony of the witnesses Elkin, Delord, or Chief Koby.

The plaintiff Thomas suffered

additional acts of retaliation for the exercise of his first amendment rights as the elected president of the Houston Police Department Patrolmens' Union.

On January 24, 1983, Thomas was the only police officer on his shift of 97 officers to be denied his seniority rights. Once again, the deprivation of the first amendment rights of Thomas was in retaliation for his speaking out on a matter of public concern, i.e., the special treatment provided by the Houston Police Department to the private security patrol of the River Oaks neighborhood.

Further, Thomas was subjected to additional deprivation of his first amendment rights by a Deputy Chief of Police, Fred Bankston, in December, 1981. Chief Bankston initiated his own "personal investigation" of Thomas

because of statements Thomas made at a press conference. The press conference was conducted by Thomas as president and spokesman for the Houston Police Patrolmen's Union. Chief Bankston gave a press conference in his office at the police station "because the union alleged a coverup in an investigation of Assistant Police Chief Tommy Mitchell." Chief Bankston admitted in his testimony that he recommended disciplinary action against Thomas because of his conduct as president at the union press conference.

The petitioner further asserts that the court has overlooked or misapprehended the evidence concerning the September, 1983 transfer of Thomas as discussed by Judge Jolly in his opinion. We stipulate that as a general rule a lieutenant of police does not normally exercise final

authority in the setting of official personnel policies and whose decision cannot be said to be municipal policy. But in this fact situation, the evidence was uncontroverted that the lieutenant who transferred Thomas in September, 1983 had been expressly and specifically delegated the final authority to implement the transfer. Capt. Dennis Schumann a defendant, testified that Lt. Webber had full authority to assign Thomas "wherever he wanted", "for whatever reason", as delegated to Lt. Webber by Captain Schumann and "by the rules of the department."

Further, in this fact situation, after Thomas spoke out on matters of a public concern, Chief of Police Lee Brown called Capt. Schumann to his office; that Chief Brown expressly and specifically

delegated his authority to Captain Schumann; Captain Schumann reported directly to Chief Brown and expressly and specifically delegated his authority to Lt. Webber; and Lt. Webber transferred Thomas.

> **If a higher official has the power to overrule but as a practical matter never does, the decision maker may represent that effective final authority on the question.**
>
> Bowen vs. Watkins, 669 F.2d 979, at 989 (1982).

Certainly the uncontroverted testimony of a defendant that the lieutenant had final authority to transfer Thomas pursuant to the expressly delegated authority of the Chief of Police and the "rules of the department" satisfies the burden established by Bowen.

CONCLUSION

THEREFORE, the petitioner humbly pleads and prays that this honorable Court grant this petition for Writ of Certiori.

Respectfully submitted,
WATTS, GLOVER & WELLS, L.L.P.

LAURENCE W. WATTS
TBA #20981000
Fed. ID #7092
1909 Morgan Street
Houston, Texas 77006
Tel. (713) 659-2887
Fax (713) 524-8889

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-2601

BOB THOMAS,

Plaintiff-Appellee

versus

HARRIS COUNTY,

Defendant

CITY OF HOUSTON,

Defendant-Appellant

Appeal from the
United States District Court for the
Southern District of Texas

(H-83-3542)

Before JOLLY and DUHE, Circuit Judges,

and PARKER, District Judge.*

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*Chief Judge of the Eastern District of Texas, sitting by designation.

E. GRADY JOLLY:**

The City of Houston, Texas, appeals a jury verdict awarding damages to policeman Bob Thomas. Thomas sued the city and others under the Civil Rights Act of 1871, 42 U.S.C. § 1983, for damages he claims to have suffered because of a personnel transfer that he contends was in retaliation for his exercise of the First and Fourteenth Amendments. The jury awarded him $50,000 in damages against the city, based solely on his claim that his transfer was in violation

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**Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not

be published.
of his rights under the First Amendment. He was then awarded attorneys' fees and prejudgment interest. We reverse. Thomas's damages were awarded againstb the city under 42 U.S.C. § 1983, based upon his claim that a transfer from one division to another in the Houston police department was in retaliation for his speech on matters relating to the police officers' union and other subjects of public concern. In order to prevail against the city under section 1983, however, Thomas was required to prove that this transfer was the result of an official policy or practice. Monell v. New York City Police Department of Social Services, 436 U.S. 658 (1978)(municipal liability under 42 U.S.C. § 1983 for deprivation of rights under color of

state law cannot be based on respondeat superior, but requires proof that the deprivation was the result of a governmental policy or custom).

The evidence showed that the decision to transfer Thomas was made by a lieutenant in the police department who did not exercise final authority in the setting of official personnel policies and whose decisions cannot be said to be municipal policy. See Bowen v. Watkins, 669 F.2d 979, 989 (5th Cir. 1982)(municipal liability for job action against policeman attaches only by decision of one exercising final authority). After a careful review of the record, we can find no basis for finding that Thomas has established a policy or custom of the city or police department of discriminating against

employees who engage in protected speech. Therefore, we can find no basis by which the city can be held liable under section 1983 for the acts that Thomas alleged occurred.

Accordingly, we VACATE the judgment, REVERSE, and RENDER judgment in favor of the city.

VACATED, REVERSED, and RENDERED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-2601

BOB THOMAS,

Plaintiff-Appellee

versus

HARRIS COUNTY,

Defendant

CITY OF HOUSTON,

Defendant-Appellant

Appeal from the
United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(SEPTEMBER 1, 1992)

Before JOLLY and DUHE, Circuit Judges and PARKER*, District Judge.

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*Chief Judge of the Eastern District of Texas, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entotled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

(Original signed by Judge Jolly)
UNITED STATES CIRCUIT JUDGE